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IN THE
COURT OF APPEALS OF INDIANA

CHARLES D. LAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0511-CR-511
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0310-FA-1573

January 17, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Charles Lain ("Lain") was convicted in Bartholomew Superior Court of Class A felony possession of methamphetamine and Class A felony dealing in methamphetamine.[1] The trial court ordered Lain to serve an aggregate sentence of fifty-five years. On appeal, Lain raises two issues, which we restate as:

I. Whether the trial court abused its discretion in failing to consider several mitigating circumstances; and

II. Whether the trial court abused its discretion in failing to conduct a balancing test before imposing consecutive sentences.[2]

We affirm.

Facts and Procedural History

On September 30, 2003, a motorist witnessed Lain driving a black GMC truck and chasing a white car driven by Lain's girlfriend, Sherry Waskom ("Waskom"). The motorist reported Lain's erratic driving behavior to the police, who then located Lain and Waskom's vehicles in the parking lot of the Senior Center in Columbus, Indiana. The Senior Center is located within one thousand feet of a park.

Lain consented to a police search of his vehicle. During the search, the officer discovered a black pouch, which contained a digital weighing scale coated with a white powder residue. The officer also found a silver metal tin that contained twelve clear plastic bags containing a powdery substance. The residue on the scale was later tested and determined to contain methamphetamine. Five of the twelve plastic bags were tested and found to contain 3.56 grams of methamphetamine.

[1] Ind. Code §§ 35-48-4-6(b)(3)(B)(ii) and 35-48-4-1 (2004 & Supp. 2006).
[2] On appeal, Lain does not argue that his sentence is inappropriate in light of the nature of the offense and character of the offender, and therefore we do not address the issue.

Lain was charged with Class A felony possession of methamphetamine having a weight of three grams or more within one thousand feet of a public park and also with Class A felony dealing in methamphetamine having a weight of three grams or more. A jury trial commenced on February 24, 2004, and Lain was found guilty of both charges. On April 12, 2004, Lain was sentenced to serve forty years for the Class A felony possession of methamphetamine conviction and fifty years for the Class A felony dealing in methamphetamine conviction, to be served consecutively for an aggregate sentence of ninety years.

Lain appealed to our court, and on February 21, 2005, we affirmed his conviction but reversed and remanded to the trial court for resentencing that would be consistent with Indiana Code section 35-50-1-2(c) (2004 & Supp. 2006).[3] We concluded that under this statute the maximum term of imprisonment for Lain's two Class A felony convictions was fifty-five years. Lain v. State, No. 03A04-0406-CR-341, Slip op. at 12-13 (Ind. Ct. App. Feb. 21, 2005).

On July 15, 2005, the trial court held a resentencing hearing. The trial court heard testimony from Lain's mother, who said she suffered a variety of health problems and "could use [Lain's] help." Resentencing tr. p. 8. Renee Carvin ("Carvin") also testified that she needed Lain's financial assistance in caring for their infant son.

After hearing such testimony, the trial court found no mitigating factors and two aggravating factors: (1) Lain had a lengthy criminal history, and (2) Lain had been placed

[3] This statute provides that "except for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted."

on probation numerous times and had violated the terms and conditions of these probations. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Lain to twenty-five years on the possession of methamphetamine conviction and thirty years on the dealing in methamphetamine conviction, ordering the sentences to be served consecutively. Lain now appeals. Additional facts will be provided as necessary.

I. Mitigating Circumstances

The finding of mitigating circumstances lies within the trial court's discretion. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. Sipple v. State, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003), trans. denied. The trial court, however, is not obligated to consider "alleged mitigating factors that are highly disputable in nature, weight, or significance." Id. (citation omitted). The trial court need enumerate only those mitigating circumstances it finds to be significant. Battles v. State, 688 N.E.2d 1230, 1236 (Ind. 1997) (citation omitted). On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record. Spears, 735 N.E.2d at 1167 (citing Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999)).

At Lain's sentencing hearing the trial court found no mitigating circumstances. On appeal, Lain contends that the trial court erred as it did not consider or assign mitigating weight to the fact that Lain's crime neither caused nor threatened serious harm to persons or property, nor did Lain contemplate that it would do so. Lain further argues that the trial court abused its discretion in failing to assign mitigating weight to the undue

hardship his incarceration would inflict on his mother and infant son. Lain relies on Indiana Code section 35-38-1-7.1(b), which states that a trial court "may" consider such facts as mitigating circumstances.

At the resentencing hearing, Lain's counsel asked the trial court to reduce Lain's sentence to the minimum based on the mitigating factors of his "family life, in addition to his mother, [and] his conduct while he's been incarcerated to this point." Resentencing tr. p. 18. Upon review of the initial sentencing transcript and the resentencing transcript, we conclude that Lain failed to argue that the trial court should consider as a mitigating factor that his crime had not caused or threatened serious harm to persons or property. If the defendant does not advance a factor to be mitigating at sentencing, a reviewing court will presume that the factor is not significant and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal. Spears, 735 N.E.2d at 1167. Therefore, we conclude that Lain's argument on the lack of harm to persons and property is waived.

Lain further contends that the trial court abused its discretion in failing to consider as a mitigating circumstance that his imprisonment would result in undue hardship to his mother and infant child. At the resentencing hearing, Karen Lain ("Karen"), Lain's mother, testified that she had health problems. She told the trial court, "My health is bad. We don't know from one month to another, you know . . . A lot of heart problems. I'm a diabetic. I could use his help. When he was out, he was helping me and it wasn't out of drug money." Resentencing tr. p. 8.

Renee Carvin ("Carvin") then testified that she was the mother of Lain's sixteen-month-old son. She said that Lain had not been able to give her any help with their son

as Lain had been incarcerated from the time of birth. Id. at 13. Lain's counsel then argued, "We're asking the Court today to find that Mr. Lain be sentenced to the minimum possible term at the Indiana Department of Correction, which would be 40 years." Id. at 17. His counsel further contended that with good time Lain would only serve twenty years, which would allow him to be released when his son was twenty-one years old. "He still would have a chance to see his son. He would still possibly have a chance to help his mother." Id. at 18.

"Our supreme court has often noted this mitigator can properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term." Weaver v. State, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), trans. denied (citations omitted). The minimum consecutive sentence of forty years, as opposed to the imposed enhanced consecutive sentence of fifty-five years, can hardly be argued to impose less of a hardship on his child or mother. See Battles v. State, 688 N.E.2d 1230, 1237 (Ind. 1997) (concluding that enhanced sentence of sixty years as opposed to sentence of presumptive fifty years would not impose additional hardship on dependent child).

We further conclude that the record does not support Lain's contention that this proffered mitigating circumstance is significant. Karen testified that she could administer her insulin shots herself. She further testified that Lain was "helping [her] out" financially. These statements do not demonstrate that Karen was dependent on Lain, and therefore do not constitute a significant mitigating circumstance justifying a reduction in his sentence.

In regards to Lain's infant son, we note that "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). The record reveals no indication that Lain has been providing any support for his son since his birth. The child was born during Lain's incarceration and has never been in Lain's care. In fact, Lain testified at the resentencing hearing that he was not aware that he had a new son. Resentencing tr. p. 16. Therefore, we decline to attach any significant weight to this proffered mitigating circumstance and determine that the trial court did not abuse its discretion in failing to find undue hardship on his son as a mitigating circumstance. See id. See e.g., Sayles v. State, 513 N.E.2d 183, 189 (Ind. Ct. App. 1987), trans. denied (holding that the trial court did not abuse its discretion by failing to find undue hardship on defendant's dependents as a mitigating circumstance where both of defendant's children already lived with their mother, who was able to support the children financially).

II. Consecutive Sentences

Lain next contends that the trial court improperly ordered his sentences to be served consecutively. When the trial court exercises its discretionary authority to impose consecutive sentences, the trial court must enter, on the record, a statement that (1) identifies all of the significant mitigating and aggravating circumstances; (2) states the specific reason why each circumstance is considered to be mitigating or aggravating; and (3) shows that the court evaluated and balanced the mitigating circumstances against the aggravating circumstances in order to determine if the aggravating circumstances offset the mitigating circumstances. Johnson v. State, 785 N.E.2d 1134, 1143 (Ind. Ct. App.

2003), trans. denied. The trial court is responsible for determining the appropriate weight to give aggravating and mitigating circumstances. Powell v. State, 751 N.E.2d 311, 315 (Ind. Ct. App. 2001) (citations omitted). On appeal, we afford great deference to a trial court's sentencing decision and will only reverse for an abuse of discretion. Diaz v. State, 839 N.E.2d 1277, 1279 (Ind. Ct. App. 2005).

Lain contends that the trial court did not perform a "balancing test" before imposing consecutive sentences, as required by our holding in Diaz. Id. at 1280-81. At the resentencing hearing the trial court discussed in detail Lain's lengthy criminal history, which includes three Class B felonies, one Class C felony, two Class D felonies, and six Class A misdemeanors. The court also discussed Lain's numerous probation violations. Contrary to Lain's argument, the trial court specifically stated at the resentencing hearing, "[t]herefore, the Court will . . . find the aggravating circumstances outweigh the mitigating circumstances." Resentencing tr. p. 24. Unlike the fact scenario in Diaz, there can be no doubt that the trial court expressly refuted the notion that the aggravating and mitigating circumstances were in equipoise. Id. Rather, the trial court unequivocally stated that the aggravating circumstances outweighed the mitigating circumstances, as required before imposing consecutive sentences. Id. at 1281.

Conclusion

We conclude that the trial court did not abuse its discretion in refusing to assign mitigating weight to the fact that Lain's incarceration would result in undue hardship on his mother and infant son. We further conclude that the trial court did not abuse its discretion in ordering Lain's sentences to run consecutively.

Affirmed.

KIRSCH, C. J., and SHARPNACK, J., concur.